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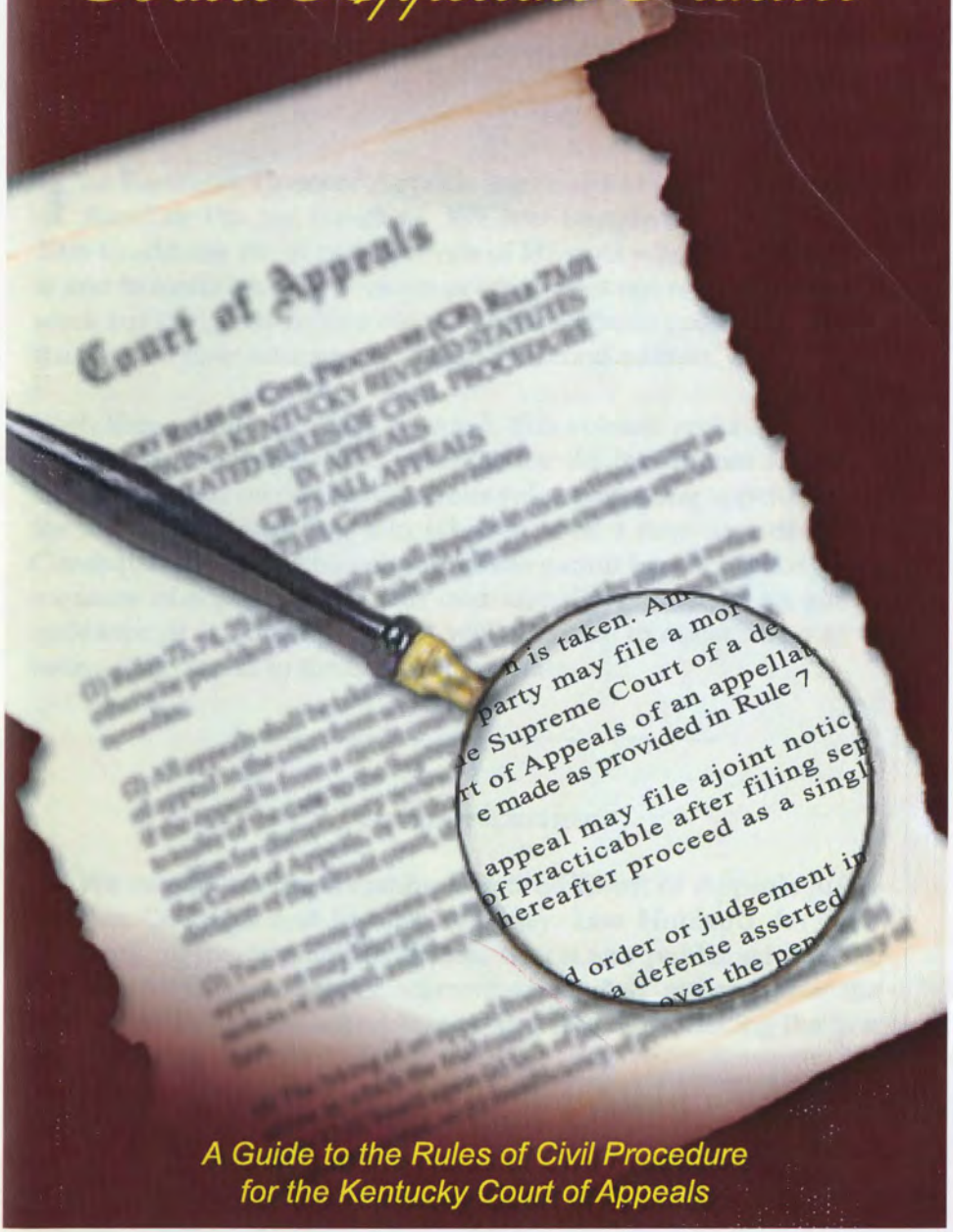
2007

KENTUCKY COURT OF APPEALS

Basic Appellate Practice



A Guide to the Rules of Civil Procedure
for the Kentucky Court of Appeals

Basic Appellate Practice Handbook is designed to benefit attorneys and pro se litigants

Chief Judge Sara W. Combs
Kentucky Court of Appeals

The Kentucky Court of Appeals is pleased to present the *2007 Basic Appellate Practice Handbook*. We first introduced the handbook in 2006 to address the very real needs of litigants who are proceeding *pro se* and to assist attorneys whose practice does not normally encompass work before our appellate courts. The handbook proved so successful that we are now releasing an updated second edition.

With those dual objectives in mind, this volume seeks to explain the most basic procedures and concepts for the lay litigant as well as to summarize succinctly the numerous rules governing appellate practice for attorneys embarking into what may be a new area of expertise. Consequently, this publication runs the gamut from simplicity to some measure of sophistication and undoubtedly represents an ambitious endeavor. It is our hope that it will continue to assist many in facilitating their access to the Court of Appeals.

In Appreciation

We extend our appreciation to retired Court of Appeals Judge Dan Guidugli and his staff attorney, Lisa Hubbard, for their work on the original handbook, which was published in 2006, and to George Fowler, current chief staff attorney for the Court of Appeals, who played a key role in producing the first handbook and in revising it for 2007.

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Introduction & Cautionary Notes

The *Court of Appeals Basic Practices Handbook* has been prepared as an introductory guide to completing the steps in the appellate process as it pertains to the Kentucky Court of Appeals. It is intended to be a simplified explanation with citations to the rules which should make use of the rules themselves easier. This handbook is not to be considered a complete practice manual, and it is not a substitute for carefully reviewing a current set of the civil rules regarding appeals.

Note: It is the responsibility of a person practicing an appeal to have access to a current set of the rules and follow those rules. In any apparent conflict between the rules and this handbook, the rules will control in all cases.

The 2007 revision of this handbook includes references to rule changes effective January 1, 2007.

Copies of the current version of the rules are available in most county law libraries and in some larger public libraries. To access West's Compilation of Court Rules & Procedures online, visit the Kentucky Court of Justice Web site at www.courts.ky.gov and click on About the Courts and then on Rules & Procedures under either the Supreme Court or the Court of Appeals.

This handbook deals only with the procedures for practicing an appeal to the Court of Appeals from a judgment in a case originally filed in the Circuit Court. Various types of cases have special procedures for appellate review which will preempt the general procedures set out in this guide. A partial list of such special procedures are detailed in the section titled "What May Be Appealed." It is the responsibility of the person practicing the appeal to be knowledgeable about any special procedures that might govern the type of action involved in that appeal.

While the staff of the Court will always attempt to be helpful and to assist all parties to the extent possible, members of the staff are not allowed to give legal advice or to make decisions for a party concerning how an appeal should be practiced. Members of the staff should not be asked for legal advice or for advice about what a party should do in a given situation. Parties practicing an appeal should research questions in the statutes and the court rules.

This handbook is available on the Court of Justice Web site at www.courts.ky.gov. Click on About the Courts and then on Court of Appeals.

Any comments concerning the contents, clarity or usefulness of this handbook should be addressed to:

Chief Staff Attorney
Kentucky Court of Appeals
360 Democrat Drive
Frankfort, Kentucky 40601

The Kentucky Court of Appeals

The Kentucky Court of Appeals, as an intermediate appellate court, was created by a group of amendments to the Kentucky Constitution known collectively as "The Judicial Article," which became effective on January 1, 1976. Prior to that time, the designation "Court of Appeals" applied to Kentucky's highest court. When the Judicial Article became effective, Kentucky's highest court became known as the Supreme Court of Kentucky. All records of the "old" Court of Appeals became those of the Supreme Court. The constitutional provisions concerning the Court of Justice are collected in Sections 109 through 124 of the Kentucky Constitution.

The intermediate appellate court was created to ease the heavy work load imposed on the highest court as a result of increased litigation and to make effective the new constitutional right to one appeal in each action. See: Section 115 of the Kentucky Constitution.

The intermediate Court of Appeals consists of 14 judges elected by the citizens of the seven Supreme Court districts defined by KRS 21A.010. The two judges from each district maintain offices within the district from which they were elected. The judges are elected for eight-year terms. Information on the current members of the Court is available on the Court of Justice Web site at www.courts.ky.gov. Click on About the Courts, then on Court of Appeals and then on Judges Directory.

The members of the Court of Appeals exercise statewide authority and sit in panels of three in various locations across the Commonwealth. Assignment of the judges is among the responsibilities of the Chief Judge of the Court who is elected by the members of the Court.

The central office of the Court, including the office of the clerk, is located in Frankfort. You can contact the Court at the following address:

Kentucky Court of Appeals
360 Democrat Drive
Frankfort, Kentucky 40601
502-573-7920

Motion Practice & Formatting and Filing Documents

Parties present their arguments on the merits of an appeal through formal briefs. However, in the course of an appeal it may be necessary to request rulings from the Court on procedural or substantive issues. These may include simple requests for additional time to file a document required by the rules, complex requests for a stay of enforcement of the judgment, or even dismissal of the appeal. These requests are handled through the Court's motion practice.

Motion Practice

Motion practice before the Court of Appeals is different from such practice before the trial court in that the parties do not appear at a set motion hour. It is extremely important that the written motion and objections be carefully prepared to present the parties' positions. Only in rare cases does the motion panel hear oral presentations on motions. CR 76.34(5).

When a motion is filed, the motion sits in the clerk's office for the running of response time. Any party is permitted to file a response within 10 days of the date of service of the motion. CR 76.34(2). If the motion was served on a party by mail, that party is allowed to add an additional three days to the response time. CR 6.05.

Note: Motions are the only documents filed in the appellate court for which the response time runs from the date of **service**. Therefore, this is the only instance in appellate practice where CR 6.05 applies.

After the response time has run or after all responses have been filed, the motion is screened to determine proper handling. Motions requesting any type of substantive relief are assigned to three-judge panels of the Court. Procedural motions requiring any application of judicial discretion are assigned to the chief judge or a member of the Court chosen by the chief judge. Purely procedural motions requesting a type of relief that the Court has already determined should be granted are assigned to the administrative ruling docket.

The administrative ruling procedure is intended to quickly rule on certain procedural motions without burdening judicial time. The Court has established certain criteria for motions that will always be ruled on in a certain way. For example, there is no reason for the Court to deny a motion for an extension of time to file a brief that (1) is filed before

the due date of the brief, (2) requests only up to a 60-day extension, (3) is the party's first request for such an extension, and (4) is not opposed by other parties. Court staff will carefully review a motion to ensure that a given motion fits all criteria as established by the Court. An administrative ruling is announced by a ruling signed by the clerk of the Court and is generally released within two days of the running of the response time.

Procedural motions that do not completely meet the criteria for administrative rulings are submitted to the chief judge or a judge designated by the chief judge on a weekly basis. Orders signed by the chief judge are entered by the clerk's office as quickly as possible after signing. Such orders are generally entered within two weeks following the running of the response time.

All substantive motions are assigned to three-judge panels for ruling. Such panels meet monthly in Frankfort and may consider up to 100 items at a sitting. Orders are signed by the presiding judge. Rulings can be expected three to eight weeks after the response time has run. In appropriate cases, a party can request an oral argument before the panel on a substantive motion. Such requests are rarely granted.

Formatting Documents

Special rules govern the form and content of briefs in the Court of Appeals. All other documents are formatted in accordance with the general rules governing documents to be filed in court.

All documents filed in the appellate court must be captioned to the proper court. CR 10.01. An example of proper captioning of a document is shown on the sample brief cover contained in Official Form 24. Of course, in place of "Brief for ...," the party should state the document being submitted, for example: "Motion to dismiss" or "Motion for additional time to submit a brief."

Documents should be typewritten. Documents prepared on a word processor printer are considered typewritten. If this is not possible and a handwritten document must be submitted, the document must be clearly readable and conform to the formatting requirements in all other respects.

Documents must be formatted in accord with CR 7.02(4). They must be on 8.5 x 11 inch paper. The type must be at least 12 point and must be double spaced. A margin of 1.5 inches must appear on the left side of

the page. All copies of the motion must be clearly readable. The text of the document should clearly state the relief requested and the reasons justifying the relief.

The document must be signed at the end by the attorney or party submitting the document.

If ruling on a motion requires the examination of any documents from the record, copies of those documents (or the relevant portions if the documents are very long) should be attached to each copy of the motion.

The Court of Appeals prepares its own orders and draft orders do not need to be submitted with a motion.

Service and Certification of Service

Any document submitted to the Court of Appeals must be served on all other parties to the appeal. CR 5.01. If a party is represented by counsel, service is completed by delivery to the party's counsel. For all documents filed in the appellate court, service may be done by hand delivery or by mail.

Each document must contain a certificate stating how service was done and listing the individuals served. The certificate must be signed by the person responsible for the service. CR 76.34(1); CR 5.03. A good sample of a certificate of service is shown on Official Form 24 although some adjustment must be made for the particular document to be filed.

Numbers of Copies

In general, five copies are required for documents filed in the Court of Appeals. The major exception is that only one copy of the prehearing statement is required. The number of copies required is set out in the rule governing the particular document and in the list found at CR 76.43.

Filing Documents

The notice of appeal, any bond under CR 73.04, and the designation of record are filed with the clerk of the trial court. All other documents must be filed in the office of the clerk of the appellate court in Frankfort. Documents may be filed in person or by mail. The address of the office is 360 Democrat Drive, Frankfort, Kentucky 40601. The office can be reached by phone at 502-573-7920.

If a document that is subject to a deadline must be filed with the appellate court clerk, that document must be received in the office of the clerk on or before the due date. CR 76.40(2). However, that rule does allow for timely filing material on the due date if the mailing is by registered mail or by a recognized carrier if the carrier marks on the outside of the envelope or box the date that the carrier received the mailing from the customer.

A party attempting to use this method of transmittal must carefully comply with the rule. Documents properly mailed under the rule are considered timely when received. However, the documents will be filed as of the date received rather than the date due in order to protect all other parties' response time.

What May Be Appealed

Finality Rule

In general, a judgment is considered final and appealable only if that judgment disposes of all of the claims presented in a Circuit Court lawsuit. A judgment or an order that does not dispose of all claims and that leaves some claims pending is considered interlocutory and may not be immediately appealed. CR 54.01. Any claims disposed of in an interlocutory order may be raised in the appellate court when a final judgment has been entered.

However, a circuit judge may make an interlocutory judgment that disposes of at least one claim final and immediately appealable by including certain findings under CR 54.02. The trial judge must find that the decision is the judge's final decision on that claim meaning that the judge has heard evidence and argument needed to resolve that claim and the judge will not change the ruling on the claim.

The trial judge must also find that there is no just reason to delay enforcement of the judgment meaning that the successful party is entitled to enforcement of the judgment and that enforcement will not affect the resolution of the remaining claims. Both findings are required to make the judgment final, and the failure to adequately recite both findings will prevent the Court of Appeals from acquiring jurisdiction. *Peters v. Hardin County Board of Education*, 378 S.W.2d 638 (Ky. 1984).

The Court of Appeals must review appeals to determine whether the judgment is final and properly appealable. The Court must dismiss an interlocutory appeal even if neither party raises the issue. *Hook v. Hook*, 563 S.W.2d 716 (Ky. 1978).

Exceptions to the Finality Rule

There are some exceptions to the finality rule that allow immediate appeals of judgments that would otherwise be considered interlocutory. Some of these exceptions have been established by statute and some by court decision. The common factor in the exceptions is that delaying the appeal of the judgment would permit events to proceed that would prevent the appellate court from granting meaningful relief.

The following list is not exhaustive of the exceptions to the finality rule that may be available:

1. An interlocutory appeal may be taken by the Commonwealth in a criminal case under certain circumstances. KRS 22A.020(4).
2. An order appointing a receiver is immediately appealable. KRS 425.600.
3. An order upholding a condemnor's right to take property in an eminent domain case is appealable. *Ratliff v. Fiscal Court of Caldwell County*, 617 S.W.2d 36 (Ky. 1981).
4. An order denying a party's motion to intervene as a matter of right is appealable. *Ashland Public Library Board of Trustees v. Scott*, 610 S.W.2d 895 (Ky. 1981).
5. An order confirming a judicial sale is appealable. *Elam v. Acme Well Drilling Co.*, 411 S.W.2d 468 (Ky. 1967).
6. An order directing property to be sold in satisfaction of a judgment is appealable. *Security Federal Savings & Loan Association of Mayfield v. Nesler*, 697 S.W.2d 136 (Ky. 1985).
7. Certain types of orders in arbitration cases are immediately appealable. KRS 417.220; See, *Valley Construction Co. v. Perry Host Management Co.*, 796 S.W.2d 365 (Ky.App. 1990).

Special Procedures

This handbook deals only with the procedures for appealing a final judgment of a civil or criminal case originating in the Circuit Court to the Court of Appeals. Space does not permit discussion of other specialized procedures that may apply in particular types of cases. The following list is not exhaustive of cases in which specialized procedures may apply.

1. Appeals from District Court to Circuit Court. CR 72.
2. Appeals from Small Claims Court to Circuit Court. KRS24A.340.
3. Appeals of habeas corpus cases. KRS 419.130.
4. Appeals in election cases. KRS 120.075.
5. Review of pretrial bail. RCr 4.43.
6. Review of bail pending appeal. RCr 12.82.
7. Review of an appellate decision of the Circuit Court. CR 76.20.
8. Review of an appellate decision of the Court of Appeals. CR 76.20.
9. An original action in the nature of mandamus or prohibition against a circuit judge. CR 76.36.

10. Appeals of a Court of Appeals decision in an original action. CR 76.36(7).
11. Appeal of denial of in forma pauperis status on appeal. *Gabbard v. Lair*, 528 S.W.2d 675 (Ky. 1975); *Bush v. O'Daniel*, 700 S.W.2d 402 (Ky. 1985); CR 5.05(4); CR 73.02(1)(b).
12. Review of Circuit Court action on a temporary injunction. CR 65.07.
13. Review of Circuit Court action on a request for stay pending appeal of a permanent injunction. CR 65.08.
14. Review of a decision of the Workers' Compensation Board. CR 76.25.

Notice of Appeal

The notice of appeal is the document used to begin an appeal taken as a matter of right. The requirements for filing the notice of an appeal to the Kentucky Court of Appeals are generally contained in CR 73. A sample of the format is found in the Official Form 22 to the civil rules.

As its title implies, the notice of appeal is intended to be a simple document notifying other parties, the trial court and the appellate court that the appellant wishes to exercise its constitutional right to review of the trial court's judgment. However, care must be taken in the preparation and filing of the notice because it will define the appeal. Some types of mistakes may not be correctable later and may limit the relief that the appellant can obtain.

Time

It is essential that the notice of appeal be filed on time. If the notice is not timely filed, the only sanction provided for in the procedural rules is dismissal of the appeal. CR 73.02(2).

A notice of appeal to the Court of Appeals from a judgment of a Circuit Court must be filed within 30 days of the judgment. Because of the requirement that the circuit court clerk send out copies of the judgment when entered, the time for filing the notice of appeal actually begins to run from the date on which the circuit clerk notes on the Circuit Court docket sheet that the circuit clerk served the judgment on counsel or the litigant if *pro se*. CR 77.04(2) and CR 73.02(1)(a).

The time for filing the notice of appeal is delayed if certain post-judgment motions are filed in the trial court. CR 73.02(1)(e). This delay permits all trial court decisions to be completed before an appeal is initiated. The full 30-day period runs from the date that the clerk notes on the docket that he or she has sent out notice of ruling on the post-judgment motions.

There is one narrow situation in which an extension of time can be obtained for the filing of the notice of appeal. If a party does not learn of the entry of the judgment or order through excusable neglect, that party can obtain an extension of 10 days by filing a motion in the trial court. CR 73.02(1)(d). The rule has been interpreted to require that the motion be filed with the trial court within 10 days of the running of the time as originally calculated. *Rodgers v. Henderson*, 612 S.W.2d 743 (Ky.App. 1980).

Payment of the Filing Fee

The required filing fee for the appeal must be paid to the circuit court clerk at the time the notice of appeal is tendered (given) to the clerk. The notice of appeal cannot actually be filed until the fee is paid. CR 73.02(1)(b). That fee is currently set at $125. CR 76.42(2)(a)(i). But KRS 23A.220(3) allows a county fiscal court to add a $25 fee in civil cases appealed to the Court of Appeals. Not all counties have exercised that option. The circuit court clerk should be consulted to determine whether the fee has been added in a particular county.

If a litigant has insufficient resources to pay the required fees, a motion to proceed *in forma pauperis* must be filed in the Circuit Court at the time that the notice of appeal is tendered to the clerk. CR 73.02(1)(b). The motion must be supported by an affidavit indicating that the person's poverty requires the waiver of the filing fee. The issue of whether filing fees should be waived is initially addressed to the Circuit Court. If the Circuit Court denies relief, a separate appeal on that issue alone may be taken to the Court of Appeals. If the Circuit Court denies *in forma pauperis* status, the party has 10 days to pay the filing fee or to file a notice of appeal to the Court of Appeal on that issue alone.

Where to File

The notice of appeal must be timely filed in the office of the clerk of the trial court. The filing fee must also be paid. While there is no prohibition against filing by mail, the notice and the fee must actually be received in the clerk's office on or before the date due. The rule that allows for filing by mail in the office of the appellate court clerk (CR 76.40(2)) does not apply to filings in the Circuit Court. Hand delivery to the circuit court clerk's office is the most certain way to ensure that the notice is timely received and the full amount of the filing fee is paid.

Designation of Parties

All parties to the appeal must be designated by name. This should be done in the body of the notice of appeal in separate paragraphs listing the appellants and appellees. Many Circuit Court documents, after the filing of the complaint, will not list all parties but will list only a lead party followed by the phrase "et al." (which means "and others") to avoid long lists of people. The term "etc." is sometimes used to shorten the description of a party to an appeal. Such shortened reference must be avoided in the notice of appeal because they do not actually designate a person or entity as a party to the appeal. All appellants and all appellees must be identified by name. If a person or entity is

involved in the litigation in a limited capacity (as executor or guardian, for example), that capacity should be included with the name.

Appellants. The notice must list all appellants responsible for the filing of this particular notice of appeal. It is important to remember that only one appellant brief may be filed in each appeal. If appellants or groups of appellants have separate interests that will make it desirable to file separate briefs, separate notices of appeal must be filed.

Appellees. In preparing a listing of appellees, the appellant must include all parties who would be affected by the reversal of the judgment. All such parties must be named. The failure to include a party whose absence prevents the granting of complete relief among the other parties to the appeal may prevent any appellate review of the judgment. *Braden v. Republic-Vanguard Life Insurance Company*, 657 S.W.2d 241 (Ky. 1983).

Designation of Judgment

The notice of appeal must list the Circuit Court judgment that the appellant wishes to have reviewed. This will normally be the final judgment in the case. Because the Supreme Court of Kentucky adopted the standard of substantial compliance, *Ready v. Jamison*, 705 S.W.3d 479 (Ky. 1986), a mistake in designating the judgment will not result in dismissal of the appeal if the judgment to be reviewed can be determined with reasonable certainty from a review of the record as a whole. However, careful and precise identification of the judgment will make it easier for the trial and appellate court clerks to set up the records and to assist the appellant in going forward with the appeal.

Stay of the Judgment Pending Appeal

In the absence of a specific statute or rule, the filing of a notice of appeal does not stay the enforcement of a judgment. *Hale v. Cundari Gas Transmission Company*, 454 S.W.2d 679 (Ky. 1969); *Taustine v. Fleig*, 374 S.W.2d 508 (Ky. 1964). Stay of the grant or denial of a permanent injunction must be sought under the provisions of CR 65.08. Stay of a money judgment or of a judgment determining the ownership of property must be obtained through the filing of a supersedeas bond under CR 73.04, 73.06, and 73.07. In all other cases, a stay must be sought by the filing of a motion for intermediate relief under CR 76.33.

Prehearing Conference Procedure

The prehearing conference procedure was inserted into Kentucky's appellate procedure to give the appellate court an opportunity to bring the parties to a discussion in the hope of settling or simplifying some appeals. Since the procedure was begun, the conferences conducted by attorneys employed by the Court have resulted in the settlement of about 37 percent of the cases in which conferences were held.

In summary, the procedure requires the appellant to file a statement on a standard form and gives the appellee the opportunity to file a responsive statement. These pleadings are then reviewed by an attorney employed by the Court who schedules conferences in those cases where it may be productive to do so. If the case cannot be settled or if the conference attorney determines that a conference would not be productive, the appeal is restored to the regular docket of the court. Even though the appeal is not settled, the conference may result in changing the appellate procedure that will assist in the resolution of the appeal.

Appeals Covered by the Procedure

The prehearing conference procedure is contained in CR 76.03. Under CR 76.03(1) the procedure applies to all civil actions except prisoner applications seeking relief relating to confinement or conditions of confinement. Amendments to the rule effective January 1, 2007, also exempted from the procedure appeals from Circuit Court orders determining paternity, dependency, abuse, neglect, domestic violence or juvenile status offense. If an appellant has questions concerning the application of the rule to a particular case, questions may be addressed to the appellate clerk's office at 502-573-7920.

The procedure applies to cross-appeals as well as to direct appeals.

Timely Filing

In any case to which CR 76.03 applies, the appellant or cross-appellant must file a prehearing statement within 20 days of the date of the filing of the notice of appeal or cross-appeal. CR 76.03(4). Appellees and cross-appellees may file a responsive pleading called a supplemental statement within 10 days of the filing of the prehearing statement. CR 76.03(6). Registered mail or an appropriate carrier may be used to timely file the statement if CR 76.40(2) is carefully applied.

The time for other steps in the appellate process are stayed until the Court removes the case from the prehearing procedure by an order directing that no conference be held or by an order reciting the results of a conference and returning the appeal to the regular procedure. CR 76.03(3).

Prehearing Statement

The prehearing statement must be filed on a form prepared for the purpose of formatting necessary information in a way that can be quickly reviewed. The circuit court clerk is required to provide the appellant or appellant's counsel with the form at the time that the notice of appeal is filed. CR 76.03(4). The form is also available online so that it can be completed electronically and then printed for filing. Visit www.courts.ky.gov then click on Forms Library at the top of the page, click on Numerically and then click on Form 070. One copy of the statement is filed in the office of the appellate court clerk. The statement must be served on opposing counsel. CR 76.03(4).

The subsections of CR 76.03(4) set out the information required to be submitted on the form. Additionally, the form requires that copies of the following documents be attached to the statement: (1) the judgment appealed and (2) the complaint or other pleading that began the current Circuit Court action.

In preparing the statement, the appellant must be aware that under CR 76.03(8), the appellant is limited to the issues raised in the prehearing statement. The appellant should carefully list all issues that are expected to be raised. Failure to do so may result in the necessity of requesting special permission from the Court to raise additional issues and may actually prevent the appellant from raising an issue for review.

Appellee's Supplemental Statement

There is no form for the preparation of the appellee's supplemental statement under CR 76.03(6). The appellee may prepare a statement in the form of a regular response, numbering the sections of the appellant's statement to which the appellee is responding. One copy of the supplemental statement must be filed with the appellate court clerk and the supplemental statement must be served on opposing counsel.

Conferences and Conference Orders

Attorneys (called conference attorneys) employed by the Court review the prehearing statements and supplemental statements to

select appeals for which conferences will be held. In preparing their statements, litigants may make a request for a conference, which will be considered by the conference attorney, but which are not binding. (CR 76.03(7)). If an appeal is to be scheduled for a conference, a secretary will contact counsel to arrange a time. An order formalizing the scheduling will follow. Conferences may be conducted in person or by telephone. Conference attorneys are willing to invest considerable time in assisting litigants to reach a mutually agreeable settlement. All statements made at a prehearing conference are confidential and may not be disclosed by the conference attorney, by counsel or by the litigants. CR 76.03(12).

If a settlement is reached, the parties may dismiss the appeal and avoid further litigation.

If a settlement is not reached, the conference attorney will enter an order restoring the case to the regular appellate procedure. The order may also direct variations in the normal appellate procedure intended to assist in the quick resolution of the appeal. CR 76.03(11).

Dispensing With the Prehearing Conference

If the conference attorney determines that a conference will not be held in the appeal, an order reciting that determination will be entered. That order will also start time running for the next step in the regular appellate process.

Record on Appeal

Introduction

The record on appeal collects the pleadings and other papers filed in Circuit Court together with the evidence introduced at trial for presentation to the Court of Appeals. Although the circuit court clerk will actually put the material together, it is the appellant's responsibility to ensure that the circuit clerk properly assembles the record and that the record includes all necessary material. CR 75.07(5). The appellant has the responsibility to include in the record all material needed by the appellate court to review the appellant's position on appeal. The appellee has the same responsibility to see that the record is complete from the appellee's standpoint. *Fanelli v. Commonwealth*, 423 S.W.2d 255 (Ky. 1968).

The Circuit Court Clerk's Record

In order to reduce the cost and delay of preparing the record, Kentucky appellate rules require the circuit court clerk to prepare the record using the original papers filed in the circuit clerk's office from the filing of the complaint to the certification of the record. The circuit clerk orders the documents, adds page numbers, binds the documents and prepares an index. This portion of the record is prepared in every appeal unless the parties prepare an agreed statement of the record under CR 75.15 (use of that rule is very rare). In addition, the circuit clerk adds to the record any videotape recording of a trial, if such occurred, and other evidentiary material as designated by the parties. Certain depositions must be excluded from the record.

The appellant should always consult with the circuit clerk's office to be sure that the appellant understands what the clerk will include in the record and what steps appellant must take to have the circuit clerk include any essential evidentiary material.

Designation of the Record

If there is any material, such as transcripts of material recorded by a court reporter (CR 75.01) or videotapes of hearings other than a trial (CR 98.(3), to be added to the material that the clerk automatically includes in the record, the appellant must file a designation of the record complying with CR 75.01 within either (a) 10 days of the filing of the notice of appeal if CR 76.03 does not apply to the appeal or (b) 10 days of the Court of Appeals order removing the case from the prehearing procedure under CR 76.03(3). The designation must be filed with the

circuit court clerk and must be served on all other parties, on the court reporter and on the clerk of the appellate court. The designation must list specifically those portions of any recorded proceedings that the appellant wishes to have included in the record on appeal.

If an appellant fails to designate material that the appellee believes is necessary to present the appellee's position on appeal, the appellee may file a counter-designation within 10 days of when the appellant's designation was due to be filed.

Videotape Recordings

In another effort to reduce the costs and delay in preparing records of court proceedings, most Kentucky Circuit Courts are equipped to record proceedings on videotape. When such a taping system has been installed in a Circuit Court, the videotape is used as the official record of the proceedings for purposes of appeal. CR 98. No transcript of the proceedings is prepared. The circuit court clerk is required to include the tapes of any trial. However, if any pretrial or post-trial hearings are needed, the appellant must file a designation listing the dates of any hearing to be added to the record on appeal.

Transcription of Stenographically Recorded Proceedings

If the appellant wishes to include in the record a transcript of a trial or any hearings recorded by a court reporter and if those proceedings have not yet been transcribed and filed with the clerk, the appellant must file a designation identifying such material. CR 75.01(1) The designation must have attached to it a certificate signed by the appellant (or counsel) and by the court reporter that sets out the date the transcript was requested, the estimated number of pages in the transcript, the estimated completion date, and a statement that satisfactory arrangements have been made between the reporter and the party designating the material to pay for the transcription. CR 75.01(2). A sample form for the court reporter's certificate is found in the forms following the Civil Rules as Official Form 23.

The court reporter is required to complete the designated transcript within 50 days of the date of service of the designation. If the court reporter cannot complete the transcript within the time allowed, the reporter must inform the party designating the transcript so that the party may seek an extension of time from the appellate court.

Depositions

The rules favor including in the record on appeal only those depositions that were given evidentiary value by the trial court. Depositions that were used only for discovery purposes should be excluded from the record on appeal. CR 75.07(1). To assist the clerk in assembling the record, the appellant is required to provide a list of depositions on file which are **not** to be included in the record on appeal. If a designation of untranscribed material is filed, the list is to be included in the designation. If no designation is required, the list must be included in a statement filed with the circuit court clerk within the same time limits as are required for a designation.

Missing Record of Proceedings

If, for any reason, the transcript or videotape of a portion of the proceedings is missing or cannot be made a part of the record on appeal, the appellant may prepare a narrative statement to replace the missing material. CR 75.13. *Cardine v. Commonwealth*, 623 S.W.2d 895 (Ky. 1981). Failure to replace the missing material may inhibit the appellate court's ability to review the issue that the appellant wishes to raise. *Porter v. Harper*, 477 S.W.2d 778 (Ky. 1972).

Certification of the Record

When the record has been properly assembled, the circuit court clerk certifies the record and sends out a notice of certification to the litigants and to the clerk of the appellate court. In most cases, the clerk is required to certify the record within 30 days of the filing of the notice of appeal (if CR 76.03 does not apply) or within 30 days of the entry of an order by the Court of Appeals removing the appeal from the prehearing conference procedure. CR 76.03(3). If a party designates for inclusion in the record a transcript that has not yet been transcribed, the clerk must certify the record within 10 days of the date on which the court reporter files the completed transcript.

Custody of the Record

After certification, the record on appeal is retained in the custody of the circuit court clerk so that it is available to the parties for the preparation of their briefs. CR 75.07(7). If counsel is allowed to check out the record, the record must be returned to the circuit clerk before the filing of counsel's brief. The parties' briefs must certify that the record has been returned to the circuit clerk or that it was not checked out from the circuit clerk. CR 76.12(6).

The Brief: Written Argument

The brief contains a party's written argument on the merits of the appeal. It is the principal and most effective way to present the party's position on appeal. Because the Court of Appeals hears oral argument in only about 20 percent of the appeals submitted on the merits, the brief may be the only opportunity to persuade the Court.

The technical requirements for preparing the brief are designed to expedite the handling of the brief in the clerk's office and in the judge's chambers. Proper presentation of material assists the judge in preparing to consider the case.

Beyond the technical requirements, careful presentation of the arguments and thoughtful assembly of an appendix will assist the judges in evaluating the parties' positions on the issues presented by the appeal.

Time for Filing Briefs

Special Cases Involving Protection of Vulnerable Victims. Amendments to CR 76.12(4)(2)(a), effective January 1, 2007, established shortened briefing times in appeals from Circuit Court orders determining paternity, dependency, abuse, neglect, domestic violence or a juvenile status offense. In such cases, the deadlines for general civil cases are shortened to allow the appellant 30 days, the appellee 30 days and the appellant 10 days for a reply brief. Counsel practicing such cases need to be aware of the shortened deadlines and of the higher standard for extension of time which may be requested only "under extraordinary circumstances."

Civil Cases. CR 76.12(2)(a) requires that the appellant brief be filed within 60 days of the date of the certification of the record (actually the date that the circuit court clerk notes on the docket that the certification of the record has been sent out). The appellee brief is due 60 days from the date of the filing of the appellant brief. The appellant reply brief is due 15 days from the date of the filing of the appellee brief. If there is more than one appellee, the appellant may file a reply brief to each within 15 days of the filing of the brief or may file a single reply brief to all appellee briefs within 15 days of the date the last appellee brief was due. If the appellant is also a cross-appellee, the party may file a single brief combining its cross-appellee and appellant reply arguments within 60 days of the date of the appellee brief.

Criminal Cases. CR 76.12(2)(b). The appellant brief is due within 60 days of the certification of the record (subject to the entry of service of notice) unless the appellant is represented by the Frankfort Office of the Public Advocate or by the Attorney General. In the latter cases, the brief is due 60 days from the date that the appellate court clerk receives the record on appeal and makes the record available to the Public Advocate or to the Attorney General. The appellee brief is due 60 days from the date of the filing of the appellant brief or from the date of the receipt of the record in the appellate court, whichever is later. An appellant reply brief may be filed within 15 days of the date of the filing of the appellee brief.

Filing of Briefs

To be timely filed, a brief must be received in the office of the clerk of the Court of Appeals within the time allowed for filing. CR 76.12(2). In computing deadlines, the rules provide that the time for filing briefs either runs from the date of a clerk's docket entry or of the filing of another brief. The additional time allowed if the deadline runs from service by mail does not apply. If a party requires additional time, a motion requesting the additional time should be filed as soon as the need becomes apparent.

If filing the brief by mail, CR 76.40(2) permits a brief to be filed by mail on the last day if a party uses United States registered mail or some other recognized carrier. The rule requires that the carrier place the date it receives the package from its customer on the outside of the package. A party must carefully comply with this rule in using the mail or a messenger service to file briefs in the Court of Appeals.

Format of the Brief

The rules for formatting a brief are contained in CR 76.12(4). "Printed briefs" are those that have been typeset and are rare in the Court of Appeals. Briefs produced on a computer printer are considered to be typewritten.

Rules for a Typewritten Brief:

Paper: 8.5 x 11 inch unglazed white paper.

Type: Black type, no smaller than 12 point (standard width), double spaced and clearly readable.

Margins: 1.5 inch on the left margin; 1 inch on all other margins.

Binding: Briefs are to be securely bound on the left side. If staples are used, the party should ensure that all sharp edges are tucked in.

Covers: Briefs must be enclosed (front and back) with colored covers indicating the nature of the brief:

Appellant - Red
Appellee - Blue
Appellant Reply - Yellow
Amicus Curiae - Brown
Other - White
Petition for Rehearing - Green
Response to Petition for Rehearing - Gray

Length: CR 76.12(4)(b)(i) sets strict limits for the length of briefs. Unless a party's motion to exceed the page limit is granted, the limits must be strictly observed. The allowed length is set as follows:

Appellant - 25 pages
Appellee - 25 pages
Appellee/Cross-appellant Combined - 40 pages
Cross-Appellee/Appellant Reply Combined - 30 pages
Appellant Reply - 5 pages (but if the brief responds to more than one appellee brief, an additional five pages is permitted for each additional appellee brief responded to)
Cross-Appellant Reply - 5 pages

Number of Copies: 5 copies are required in the Court of Appeals CR 76.12(3)

Organization of the Appellant's Brief

CR 76.12(4)(c) provides guidelines for the organization and contents of the appellant's brief. The organizational rules exist to allow the appellate judge to efficiently review the brief.

The **Introduction** lets the judge know what area of law is involved in the appeal. The introduction should be very short. Samples are included in the rule.

The **Statement Concerning Oral Argument** should be one brief paragraph indicating whether the appellant desires oral argument on the appeal and any reason that appellant can offer to support the value of an oral argument in resolving the appeal.

The **Statement of Points and Authorities** lists the issues the party will discuss in the "Argument" section of the brief. The statement of each

issue should be simple and direct. Under each issue, the appellant should list the legal authorities cited in the argument together with the page of the brief on which the authority is cited. This listing gives the appellate judge a quick listing of material that may need to be read in conjunction with the brief.

The **Statement of the Case** is the "story" of the case and sets out the facts of the case and the procedural events the judge needs to know to understand the case. The statement should be sufficiently complete for a comprehensive understanding of the case, but should not contain unnecessary material. The statement should be as objective as possible and without personal attacks. Each statement narrated should be supported by a reference to the specific page number or tape reference number to show where the fact appears in the record. CR 98 (4)(a) provides a form for citing to a videotape recording.

The **Argument** tracks the "Statement of Points and Authorities" and presents the issues that appellant believes require a different result than that reached by the trial court. Any facts stated must be supported by references to the record and statements concerning the law must be supported by citations of authority. CR 76.12(4)(g) provides a specific format for citing to Kentucky statutes and opinions. At the beginning of the discussion of each issue, the appellant must include a statement (with a reference to the record) showing how and when the issue was **Preserved for Appeal**. It is helpful to also set out the standard of review that the appellate court should use.

The **Conclusion** states the relief sought by the appellant. The request should be as specific as possible. The name of the attorney or unrepresented litigant submitting the brief and responsible for the contents of the brief must appear following the conclusion. CR 76.12(6).

The **Appendix** should contain material from the record that the appellant wishes to make easily available to the reading judge. The appellant is required to have a copy of the judgment appealed and any opinion of the trial court as the first item in the appendix. In deciding what other documents to include in the appendix, the appellant should consider that only the presiding judge of the panel will have the record on appeal immediately available in the judge's office. The associate judges will each have a set of the briefs including the appendix. If there are essential documents from the record that the judges should closely examine, copies should be included in the appendix. However, the

appellant should not make the appendix unnecessarily large. Material not in the record on appeal may not be included in the appendix. However, CR 98(3)(b and c) encourage the use of an evidentiary appendix to include transcription of essential sections of a videotaped record. If the appendix is large, it may be bound separately from the brief in red covers appropriately labeled. A list of the items included in the appendix must be placed at the beginning of the appendix. The items in the appendix must be separated by tabs.

Organization of the Appellee's Brief

CR 76.12(4)(d) provides guidelines for the organization and contents of a brief for an appellee. The requirements are the same as for the appellant (see previous paragraphs) except that the rules do not require an introduction or any specific appendix material. The remarks above concerning the appendix should be considered by the appellee as well. The appellee should not duplicate documents included in the appellant's appendix, but may refer to documents included by the appellant.

Organization of the Appellant's Reply Brief

The appellant's reply brief is confined to points raised in the appellee brief and should not repeat arguments already made. CR 76 (4)(e). If the brief is five pages or less, a "statement of points and authorities" is not required.

Service of the Brief

Copies of the brief must be served on all adverse parties (by service on their counsel if a party is represented by counsel) and on the trial court judge whose decision is under review. In a criminal case, both the defendant and the Attorney General must serve the commonwealth's attorney of the district from which the appeal comes. CR 76.12(5).

Certifications Required

The cover of each brief must contain a signed statement identifying by name the individuals served with copies of the brief. The certification must also contain a statement that the record on appeal has been returned to the court clerk or that the record was not withdrawn. CR 76.12(6). A sample of a cover for a brief including the required certification is set out in Official Form 24 to the Civil Rules.

Samples of Briefs

The Court does not have sample or form briefs. However, briefs filed in recent Supreme Court of Kentucky and Kentucky Court of Appeals cases that resulted in a published opinion are now available online through the Northern Kentucky University Salmon P. Chase College of Law. You can access these briefs by visiting http://chaselaw.nku.edu/library/.

While differing in some respects, such as page length, Supreme Court briefs are governed by the same general rules as Court of Appeals briefs. A review of some of the briefs may be a valuable experience for a person who has never before prepared a brief.

Sanctions for Failure to File a Brief

If an appellant fails to file a brief within the time allowed by the rules or by an order of the Court, the appeal may be dismissed. CR 76.12(8)(b).

If no appellee files a brief, the Court may either: (1) accept the appellant's statement of the facts and issues as correct, (2) reverse the judgment if the appellant's action reasonably appears to sustain that result or (3) treat the failure to file a brief as a confession of error and reverse the judgment without consideration of the merits. CR 76.12(8)(c).

Submission & Consideration of Appeals

Transmittal of the Record to the Appellate Court

The circuit court clerk sends the record on appeal to the appellate court when transmittal is requested by the appellate court clerk. CR 75.07(12). In a civil case, this will occur after an appellant reply brief is filed or the time for filing such a brief has run. CR 79.06(7). In a criminal case, the time for transmittal of the record will occur (1) after the certification of the record if a criminal defendant is represented by the Frankfort Office of the Public Advocate, (2) after filing of the appellant's brief if a criminal defendant is represented by someone other than the Frankfort Office of the Public Advocate, or (3) after certification if the Commonwealth is the appellant.

Submission of an Appeal on the Merits

After receipt of the record and the filing of all briefs, the appeal is submitted to the Court for consideration and decision. CR 76.26. Once the appeal has been submitted, no additional materials related to the merits of the case may be filed unless leave to do so is requested by motion.

Assignment to a Panel

The 14 judges of the Court of Appeals sit in panels of three judges. The chief judge of the Court assigns judges to sit on panels and those panel assignments are changed monthly. SCR 1.030(7). The chief judge is also responsible for assigning cases to the panel and designating the presiding judge on each case. The presiding judge will ordinarily author the opinion of the panel and is responsible for ensuring that the appeal moves without unnecessary delay.

After submission, a case is assigned to a panel. While any delay will be dependant upon the Court's workload, such assignment will usually occur within two to six weeks after submission. Normally, the panel will be scheduled to meet about four months after the assignment. For example, cases delivered to the judges in early September will be for their December panels. The early delivery of cases to the judges allows them to screen cases and schedule oral arguments.

When material is distributed, the presiding judge receives the record and a set of briefs. The associate judges receive only sets of briefs with any appendix filed with the briefs.

Once the assignment of the panels has been made, the assignment is a matter of public record. The Clerk of the Court of Appeals will send a notice to counsel and any unrepresented parties identifying the members of the panel. The identity of the panel members may be found on the clerk's record of the individual case on the Court of Justice Web site at www.courts.ky.gov. However, counsel and litigants must be aware that judges cannot receive any contact about a case from the parties except through a proper filing in the office of the clerk. Any attempt to make such contact may require the judge to disqualify himself from the case and may subject the offending party to sanctions.

Oral Argument and Non-Oral Cases

In recent years through 2006, the Court of Appeals has scheduled oral argument in less than 20 percent of the appeals assigned to panels for decision on the merits.

Appeals are initially selected for oral argument by the presiding judge. In general, the Court favors oral argument on questions of law rather than fact. Because a layperson would be at a considerable disadvantage in arguing against trained counsel, oral argument is not scheduled unless both sides are represented by counsel. CR 76.16(4). When all three members of the panel have selected cases for oral argument, arguments are scheduled at a reasonably convenient location. Panels are scheduled across the Commonwealth depending upon the location of counsels' offices.

Orders are entered informing counsel of the scheduled time and place for oral argument as soon as practical after assignment. Normally, counsel will receive such a scheduling order at least two months before the date of oral argument. If counsel has any conflict with the scheduled date, a motion to reschedule should be promptly filed.

The time allowed for oral argument will be set out in the order scheduling oral argument. Normally 30 minutes will be allowed with the time being equally divided between the appellant and the appellee.

The oral argument schedule of the Court of Appeals is available on the Court of Justice Web site at www.courts.ky.gov. Click on About the Courts, then on Court of Appeals and then on Oral Arguments Calendar.

The order scheduling oral argument also provides special provisions for counsel to submit to the panel any new authority rendered after the filing of briefs. Counsel wishing to submit such authority must carefully comply with the provisions of the order.

If the Court determines that oral argument will not be heard on an appeal, an order dispensing with oral argument is entered. If counsel can advance good reasons for holding oral argument, a motion to reconsider must be filed within 10 days of the entry of the non-oral order. CR 76.38(2). The Court cannot render the opinion in the appeal until the time for filing such motions has run and any such motions have been ruled on. CR 76.16(1). If a case is considered without oral argument, the panel may render an opinion before the month for which the case is assigned if the work load of the panel members permits.

Decisions of the Court

Procedural matters may be handled by one judge whose signature appears on the order.

All opinions on the substantive merits of an appeal and all dispositional decisions must be done by a panel of three judges. The decision lists the members of the panel on the "BEFORE" line of the document. At the end of the document, there is a statement concerning whether all the panel members concurred (agreed with the decision). If any member of the panel dissents (disagrees) from the majority decision, that fact is stated at the end of the majority opinion. A concurring or dissenting judge may write a separate opinion stating that judge's reasons. A decision by a majority of the panel is the decision of the Court of Appeals. SCR 1.030(7)(d).

The Court of Appeals may dispose of a case by affirming or reversing the entirety of the judgment or the Court of Appeals may affirm as to some issues and reverse as to others. The Court of Appeals may vacate the Circuit Court decision if the Circuit Court omitted some essential step in reaching its decision. The Court of Appeals may remand the case to the Circuit Court for further procedure if necessary. If a case is remanded to Circuit Court, a party adversely affected by the decision of the Circuit Court on remand may take new appeal of that decision. However, the "law of the case" doctrine may prevent the Court of Appeals from reviewing issues conclusively decided on the first appeal.

Decisions of the Court of Appeals are announced in one of three types of documents: an opinion, an order, or an opinion and order. The documents differ in their effective date and in the manner in which litigants may seek further review in the Court of Appeals.

Opinions: CR 76.28

An opinion is headed as such in the caption of the document, for example, "Opinion Affirming." An opinion lists the panel deciding the case as well as the authoring judge, but does not have an actual signature. The Court announces most decisions on the merits of appeals in opinions.

Opinions are rendered on Friday with the actual time of release alternating between 10 a.m. and 2 p.m. No information can be

about an opinion until the release time. Opinions are mailed to counsel or the unrepresented litigants on the Thursday before rendition. Opinions are available at the release time at www.courts.ky.gov through Searchable Opinions under Court of Appeals or the Research/ Reference area of the site. The Court of Appeals Minutes, which list all of the decisions for a given week, are also available in the Court of Appeals section. The file number for each opinion listed on the Minutes is a link that connects to the text of the opinion itself.

The opinion shows on its face the date of release and whether the opinion is designated for publication. The designation indicates whether the Court intends the opinion to be cited as precedent. Even though the Court may not have designated an opinion for publication, amendments to CR 76.28(4)(c) allow unpublished opinions rendered after January 1, 2003, to be cited "for consideration" only "if there is no published authority that would adequately address the issue before the Court."

All opinions of the Court of Appeals are public record.

If a decision is announced in an opinion, further review in the Court of Appeals must be sought by a petition for rehearing under CR 76.32.

An opinion is not effective until it becomes final under CR 76.30. Until that time it is only advisory to the parties.

Orders

The Court of Appeals uses orders to announce all procedural rulings, most dismissals of appeals, and the substantive disposition of original actions and other expedited actions. Orders have the signature of the judge making the ruling or of the presiding judge of the panel making the ruling. If the order announces a panel decision, the panel is listed on the "BEFORE" line of the order.

Orders show the date of entry near the signature of the judge and are effective immediately upon entry. Orders are entered as soon as possible after being received in the office of the clerk. In an urgent situation, a judge may order that an order be effective upon signature without the necessity of entry by the clerk.

Orders are very seldom designated for publication.

If a decision is announced by an order, further review in the Court of Appeals must be sought by a motion to reconsider under CR 76.38.

Opinion and Orders

An "opinion and order" was developed as a document that would be effective immediately, but would contain more explanation than most orders. It is now used when the Court of Appeals wishes to provide a more detailed explanation than is usual in an order and when the Court wishes to provide a published decision that must be effective immediately.

An opinion and order lists the panel making the decision, lists the author of the document and is actually signed by the author. Both opinions and opinion and orders are always rendered on Friday.

A decision announced in an opinion and order is subject to further review in the Court of Appeals by a motion to reconsider under CR 76.38.

Petitions for Rehearing & Motions to Reconsider

Once a decision is made in a case in the Court of Appeals, a party can request that the Court of Appeals review the decision. However, it is important to note that there are two different methods of requesting such review, and the choice of how to proceed depends upon the type of document used by the Court to announce the decision. If an opinion was used, a petition for rehearing under CR 76.32 is appropriate. If an order or an opinion and order was used, a motion to reconsider under CR 76.38 is appropriate. The pleadings are not interchangeable. CR 76.32(1)(a). The choice is significant because of the different time deadlines and format requirements.

There is no authority that requires a petition for rehearing or motion to reconsider as a prerequisite for seeking review in the Supreme Court of Kentucky.

Petitions for Rehearing

If a party is adversely affected by an opinion of the Court of Appeals, that party may file a petition for rehearing or a petition for modification or extension of the opinion under CR 76.32. The relief available on a petition for rehearing is very limited under CR 76.32(1)(b), which provides that relief will be granted only when a petitioner can convince the Court that "the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto." If a party does not wish to challenge the result of the opinion, but wishes to have inaccuracies corrected or to request the court to address issues not addressed in the opinion, the party should file a petition for modification or extension. CR 76.32(1)(c). A party may request rehearing or modification or extension in a single petition.

Five copies of a petition under CR 76.32 must be filed within 20 days of the date on which the opinion was rendered. CR 76.32(2). If a party requires more time to prepare the petition, a motion requesting additional time must be filed on or before the date the petition is due. The petition may be timely filed by mail if CR 76.40(2) is carefully complied with. The petition must be accompanied by the filing fee required by CR 76.42(2)(v), which is currently $125.

In general, the petition must conform to the format prescribed for briefs under CR 76.12(4) except that the petition has green covers and is limited to 10 pages. A copy of the opinion must be attached to each

copy of the petition. In preparing the petition, a party should be aware that the members of the panel already have copies of the briefs previously filed and that the arguments of the petition should be directed to the opinion as rendered.

Opposing parties may file responses to the petition within 20 days of the date on which the petition was filed. The responses must have gray covers and are limited to 10 pages.

A petition under CR 76.32 is assigned to the same panel that considered the appeal. However, a different judge is designated as the presiding judge. CR 76.32(6)(b).

A petition under this rule is normally ruled on by an order. If a petition is granted, a party adversely affected may file a petition under CR 76.32, but no response is permitted to a second petition. CR 76.32(1)(d). If a petition is denied, no request for reconsideration of that ruling is permitted. CR 76.38(3).

Motions to Reconsider

If a ruling of the Court of Appeals is announced by order, a party adversely affected may file a motion to reconsider under CR 76.38. A decision announced in a document headed as an opinion and order is treated as an order for purposes of reconsideration. CR 76.38(1); CR 76.32(1). The procedure of CR 76.38 applies to both procedural and substantive orders of the Court of Appeals except for certain rulings specifically listed in CR 76.38(3). The rulings that are not subject to reconsideration include: (1) orders granting or denying interlocutory relief under CR 65.07 or CR 65.08, (2) orders granting or denying transfer under CR 74.02, (3) orders granting or denying discretionary review under CR 76.20, and (4) orders granting or denying petitions for rehearing under CR 76.32.

A motion to reconsider must be filed within 10 days of the entry of the order that is subject to reconsideration. No special format is required beyond the normal motion format. No colored covers are required.

If the order complained of was a final order in an appeal or was an "opinion and order," the filing fee required by CR 76.42(2)(x), which is currently $125, must be paid.

In general, a motion to reconsider is assigned to the panel that made the initial decision.

Further Review in the Supreme Court

Final decisions of the Court of Appeals may be reviewed by the Supreme Court of Kentucky. In a majority of cases, review must be sought by a motion for discretionary review. In Workers' Compensation cases under CR 76.25 and in original actions under CR 76.36, review is by a matter of right appeal.

Motions for Discretionary Review

In any case appealed as a matter of right from the Circuit or Family Court to the Court of Appeals and in any case on which discretionary review was granted or denied in the Court of Appeals, a party may seek review in the Supreme Court by the filing of a motion for discretionary review. The motion must be filed in the office of the Supreme Court clerk within 30 days of the rendition of an opinion, the entry of an order disposing of a petition for rehearing, the entry of an order denying discretionary review by the Court of Appeals, or the entry of some other order finally disposing of an appeal. The motion must be in the form provided by CR 76.20 and must be accompanied by the filing fee specified in 76.42. Questions concerning the motion should be addressed to the office of the clerk of the Supreme Court.

Notice of Appeal to the Supreme Court

In an appeal of a Workers' Compensation case under CR 76.25 or an original action filed in the Court of Appeals under CR 76.36, review in the Supreme Court is by a matter of right appeal. CR 76.36(7), CR 76.25(12); *Vessels v. Brown-Forman Distillers Corp.*, 793 S.W.2d 795 (Ky. 1990).

The notice of appeal must be filed in the office of the clerk of the Court of Appeals within 30 days of the date of the rendition of the opinion, of the entry of the order disposing of the petition for rehearing, or the entry of any other order making final disposition of the action. The notice must be served on all opposing counsel, and the filing fee required by CR 76.42 must be paid.

Final Disposition of Appeals

Effective Date of Opinions

If a decision of the Court is announced by an opinion, the opinion is not effective until it becomes final under CR 76.30(2). Such a decision may not be enforced until it is final.

A decision of the Court of Appeals becomes final on the 31st day after the rendition of the opinion unless a petition for rehearing or motion for discretionary review has been timely filed. If a petition for rehearing has been filed, the opinion becomes final on the 31st day after the entry of an order disposing of the petition for rehearing unless a motion for discretionary review is timely filed. CR 76.30(2)(c).

If a motion for discretionary review is filed in the Supreme Court of Kentucky, a Court of Appeals opinion becomes final immediately upon denial of the motion by the Supreme Court. CR 76.30(2)(b). If the motion for discretionary review is granted, the Court of Appeals opinion never becomes effective, but is replaced with the decision of the Supreme Court.

When the opinion becomes final, the clerk of the Court of Appeals stamps an endorsement on the face of the opinion and sends copies of the endorsed opinion to the circuit court clerk. CR 76.30(2)(e). At the time that opinion is made final, the clerk of the Court of Appeals also returns the original record to the circuit court clerk for further action or for storage and eventual archiving. The clerk of the Court of Appeals retains a permanent record only of the documents filed in the appellate court and the orders and opinion of the Court of Appeals.

Also at the time that the opinion is made final, the clerk of the Court of Appeals sends out any required letter on the reimbursement of the filing fee. CR 76.42(3).

Kentucky no longer uses a mandate (an order from the clerk) to make appellate opinions effective.

Effective Date of Orders

Unless an order states otherwise, an order is effective upon entry in the office of the clerk of the Court of Appeals and must be obeyed. A document styled as an "opinion and order" is treated as an order. CR 76.38(1).

If an order disposes of an appeal, the office of the clerk of the Court of Appeals will close out an appellate record (including the return of any original circuit court record) on the 31st day after the entry of the order unless a motion to reconsider or a motion for discretionary review has been filed. If a motion to reconsider is denied, such closure will occur on the 31st day after the entry of the order denying the motion to reconsider. If a motion for discretionary review is filed in the Supreme Court, the record is not closed until the Supreme Court disposes of the motion filed there.

Decisions Designated for Publication

If a decision has been designated for publication, the clerk of the Court of Appeals will send a notice to West Publishing Company allowing the opinion to be printed in the *Southwestern Reporter*. Until the clerk releases the opinion as final, it may not be relied upon as authority.

Storage of Records

The clerk of the Court of Appeals continues to store the records of the appellate court in the central office for approximately four years. The records are eventually removed to the custody of the Kentucky Department for Libraries and Archives.

Abbreviations

CR Kentucky Rules of Civil Procedure

KRS Kentucky Revised Statutes

RCR Kentucky Rules of Criminal Procedure
Note that in the absence of a particular exception, the Rules of Civil Procedure apply to appeals in criminal cases.

SCR Rules of the Supreme Court of Kentucky

Glossary

Affirm. To confirm a judgment on appeal; declaration used when the appellate court finds no reversible error.

Appeal. A legal procedure in which a party who is dissatisfied with a judgment of a trial court may seek review of that judgment in a court with higher authority.

Appellant. A party to a legal proceeding who seeks relief in the appellate court from a trial court judgment.

Appellee. A party who opposes an appeal and who usually seeks to have the judgment affirmed.

Concur. To agree with a decision.

Dissent. To disagree with a decision.

In forma pauperis. A procedure allowing a person who cannot pay court fees because of poverty to proceed without payment of those fees.

Litigant. Any party to a lawsuit.

Motion. A document filed with the court seeking some relief short of a decision on the merits of an appeal, such as an extension of time or dismissal of an appeal.

Opinion. A document rendered by a court announcing a decision on the merits of an appeal and setting out the reasons for that decision.

Order. A document from a court granting or denying a motion or directing that some action be taken.

Pro se. A person who is representing himself or herself in litigation and who is proceeding without an attorney.

Remand. To send a case back to a lower court with directions to take some further action.

Response. A document filed with the court by a party opposing a motion; a response may, in some instances, express a lack of opposition to the relief sought or even join in the request for relief.

Reverse. To declare that a judgment is wrong due to some significant error and that the judgment may not be enforced.

Vacate. To set aside a judgment because the trial court failed to take a required step in deciding a lawsuit.